



Authorization of Appropriations: Procedural and Legal Issues

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September 9, 2014

Congressional Research Service

7-5700

www.crs.gov

R42098

CRS Report for Congress

Prepared for Members and Committees of Congress

Summary

To provide funding for discretionary spending programs of the government, Congress generally uses an annual appropriations process. Under congressional rules, when making decisions about the funding of individual items or programs, however, Congress may be constrained by the terms of previously enacted legislation. The way in which the House and Senate interpret and apply this concept under their respective rules and precedents creates a distinction between authorized and unauthorized appropriations. This report provides a brief explanation of this distinction, and its significance for understanding how appropriations and other legislation work in conjunction to determine how agencies may spend appropriated funds.

The U.S. Constitution grants Congress the “power of the purse” by prohibiting expenditures “but in Consequence of Appropriations made by Law.” As a result, legislation to provide for government expenditures must adhere to the same requirements and conditions imposed on the law-making process as any other measure. The Constitution does not, however, prescribe specific practices or procedures. Instead, the manner in which the House and Senate have chosen to exercise this authority is a construct of congressional rules and practices, which have evolved pursuant to the constitutional authority of each chamber to “determine the Rules of its Proceedings.” One effect of these rules has been the formalization of funding decisions as a two-step process, in which separate legislation to establish or continue federal agencies, programs, policies, projects, or activities, is presumed to be enacted first, and is subsequently followed by legislation that provides funding. Another effect of these rules has been a distinction between those appropriations authorized by law and those not authorized by law. Under the rules of the House and Senate, this distinction is largely based on technical issues related to the precedents of the respective chamber; the existence of legislation defining the legal authority for particular federal agencies, programs, policies, projects, or activities; and the relationship of such authority to the applicable appropriation.

In most cases, an appropriation is said to be authorized when it follows explicit language defining the legal authority for a federal agency, program, policy, project, or activity that will be applicable in the same fiscal year for which the appropriation is to be enacted. In contrast, an appropriation is said to be unauthorized when no such authority has been enacted or, if previously enacted, has terminated or expired.

There is no constitutional or general statutory requirement that an appropriation must be preceded by a specific act that authorized the appropriation. According to the Government Accountability Office, “The existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is itself sufficient legal authorization for the necessary appropriations.”

An authorizing statute that establishes a federal agency often creates statutory duties and obligations for that federal agency (including the responsibility to conduct certain activities such as enforcement of the particular law that the agency is charged with administering). If an authorization of appropriations expires, or if Congress fails to appropriate sufficient funds without explicitly denying their use for a particular purpose, those statutory obligations still exist even though the agency may lack sufficient funds to satisfy them.

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Introduction

To provide funding for discretionary spending programs of the government, Congress generally uses an annual appropriations process.¹ Under congressional rules, when making decisions about the funding of individual items or programs, however, Congress may be constrained by the terms of previously enacted legislation. The way in which the House and Senate interpret and apply this concept under their respective rules and precedents creates a distinction between authorized and unauthorized appropriations. This report provides a brief explanation of this distinction, and its significance for understanding how appropriations and other legislation work in conjunction to determine how agencies may spend appropriated funds.

Background

The U.S. Constitution grants Congress the “power of the purse” by prohibiting expenditures “but in Consequence of Appropriations made by Law.”² As a result, legislation to provide for government expenditures must adhere to the same requirements and conditions imposed on the law-making process as any other measure. The Constitution does not, however, prescribe specific practices or procedures. Instead, the manner in which the House and Senate have chosen to exercise this authority is a construct of congressional rules and practices, which have evolved pursuant to the constitutional authority of each chamber to “determine the Rules of its Proceedings.”³ One way in which both chambers have chosen to exercise this authority is to adopt rules that limit appropriations to purposes authorized by law. This requirement allows Congress to distinguish between legislation that addresses questions of policy, and that which addresses questions of funding, and to provide for their separate consideration. In common usage, the terms used to describe these types of measures are *authorizations* and *appropriations*, respectively.

An authorization may generally be described as a statutory provision that defines the authority of the government to act. It can establish or continue a federal agency, program, policy, project, or activity. Further, it may establish policies and restrictions and deal with organizational and administrative matters. It may also, explicitly or implicitly, authorize subsequent congressional action to provide appropriations. By itself, however, an authorization does not provide funding for government activities.

An appropriation may generally be described as a statutory provision that provides budget authority, thus permitting a federal agency to incur obligations and make payments from the Treasury for specified purposes, usually during a specified period of time.

The distinction between authorizations and appropriations appears to have been understood and practiced long before it was formally recognized in the rules, and was probably derived from earlier British and colonial practices.⁴ Early Congresses seem to have accepted without major

¹ For further information on the congressional appropriations process, see CRS Report R42388, *The Congressional Appropriations Process: An Introduction*, by Jessica Tollestrup.

² Article 1, §9.

³ Article 1, §5.

⁴ CRS Report 84-106 GOV, *Legislation, Appropriations, and Budgets: The Development of Spending Decision-Making in Congress*, by Allen Schick, p. 9. (Out of print; available upon request from the authors of this report.)

controversy the practice of considering appropriations separate from other legislation. As this practice developed, the distinction between appropriations and other types of legislation was reflected in the designation of measures containing budget authority for more than one purpose as “supply bills,” highlighting their purpose as supplying funds to carry out government operations already established in law. The inclusion in early bills of substantial new legislative language was generally believed to be inappropriate, as it might delay the provision of necessary funds, or lead to the enactment of matters that might not otherwise become law.⁵ This distinction was further reflected by the form of early supply bills, which were drafted in the House with particular objects of expenditure identified, but with blanks rather than recommended dollar amounts.⁶ Such bills were seldom subject of extensive debate, except for the purpose of filling in the blanks.

Establishment of Formal Rules

According to *Hinds' Precedents*, the origin of a formal rule prescribing the separation of authorizations and appropriations is found in 1835 during the 24th Congress, when the House discussed the increasing problems of delays in enacting appropriations.⁷ A significant cause of such delays was attributed to the inclusion of “debatable matters of another character.” John Quincy Adams, then a Member of the House, suggested that before the House consider such measures they should be stripped of “everything but were legitimate matters of appropriation, and such as were not ... [be] made subject of a separate bill.” Although the proposal was not adopted at that time, the failure of an appropriations bill for fortifications during that same Congress, due to the inclusion of legislative language, apparently inspired the House to adopt such a rule in the 25th Congress, which stated, “No appropriation shall be reported in such general appropriation bills, or be in order as an amendment thereto, for any expenditure not previously authorized by law.”⁸

The Senate did not formally adopt a parallel rule until 1850, when it prohibited amendments to general appropriations bills proposing additional appropriations unless it was for the purpose of carrying out the provisions of existing law.⁹ While the form and specific applications of these rules have evolved over time, their basic principles still persist in the rules of both chambers today.

House and Senate rules related to unauthorized appropriations apply specifically to general appropriations bills. In the House, “general appropriations bills” are the annual appropriations acts (or any combination thereof) and any supplemental appropriations acts that cover more than one agency, but not continuing appropriations acts.¹⁰ In contrast, for the Senate, “general appropriations bills” are the annual appropriations acts (or any combination thereof) and any

⁵ Ibid., p. 9-11.

⁶ Ibid., p. 10; Ralph Volney Harlow, *The History of Legislative Methods in the United States before 1825*, p. 226; Annals, 15th Cong. 2nd sess., p. 471.

⁷ Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* (Washington: GPO, 1907-1908), vol. 4, Section 3578; *Congressional Globe*, 24th Cong. 1st sess., p. 20.

⁸ Hinds, Section 3578.

⁹ As the House has historically claimed the exclusive right to originate appropriations bills, the Senate often considers appropriations in the form of amendments to House bills. See William Holmes Brown, Charles W. Johnson, and John V. Sullivan, *House Practice: A Guide to the Rules, Precedents and Procedures of the House*, 112th Cong., 1st sess., (Washington: GPO, 2011), (Hereinafter *House Practice*), chapter 4, §2.

¹⁰ See *House Practice*, chapter 4, §3.

supplemental as well as continuing appropriations acts that cover more than one agency or purpose.¹¹

One effect of these rules has been the formalization of funding decisions as a two-step process, in which separate legislation to establish or continue federal agencies, programs, policies, projects, or activities, is presumed to be enacted first, and is subsequently followed by legislation that provides funding. This presumption of sequential action, however, is not understood to entail any requirement that authorizing legislation occur periodically or in the same year as appropriations action. In fact, until the 1950s, most authorization laws were permanent, and rarely included provisions that authorized appropriations for a specific amount or period of time.¹²

“Authorized” and “Unauthorized” Appropriations Distinguished

Another effect of these rules has been a distinction between those appropriations authorized by law, and those not authorized by law. Under the rules of the House and Senate, this distinction is largely based on technical issues related to the precedents of the respective chamber; the existence of legislation defining the legal authority for particular federal agencies, programs, policies, projects, or activities; and the relationship of such authority to the applicable appropriation. In many cases, however, discourse regarding whether an appropriation is referred to as authorized or unauthorized appeals not to technical distinctions of this kind, but to some other understanding or expectation that unauthorized appropriations are legally problematic. Such issues are discussed in a later section of this report.

In most cases, an appropriation is said to be authorized when it follows explicit language defining the legal authority for a federal agency, program, policy, project, or activity that will be applicable in the same fiscal year for which the appropriation is to be enacted. In contrast, an appropriation is said to be unauthorized when no such authority has been enacted or, if previously enacted, has terminated or expired. The interpretation of this principle, however, may depend on additional distinctions, including whether the statute authorizing the program also explicitly authorizes appropriations for the program, or does so implicitly. It is generally understood that statutory authority to administer a program or engage in an activity, sometimes referred to as organic or enabling legislation, also provides implicit authorization to appropriate for such program or activity even in the absence of an explicit authorization of appropriations. If an explicit authorization of appropriations is present, however, it may expire even though the underlying authority to administer such a program or engage in such an activity does not. Appropriations for such programs or activities may still be regarded as authorized in some cases.

The interaction between authorizations and appropriations can also be affected by how specific or general an authorization is. For example, some statutes that provide an explicit authorization of appropriations place a limit on the amount that is authorized, either generally for a class of programs or activities, or for a more specifically designated program or activity. In these instances, appropriations in excess of such limits are generally considered to be unauthorized. Appropriations that address only some of the activities framed more generally in the authorization

¹¹ See Floyd M. Riddick and Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), (Hereinafter *Riddick’s Senate Procedure*), p. 159.

¹² Testimony of Director, Congressional Budget Office, Douglas Holtz-Eakin, “Unauthorized Appropriations and Senate Resolution 173, in U.S. Congress, Senate Committee on Rules and Administration, hearing, 108th Cong., 1st sess., July 9, 2003, available at <http://www.cbo.gov/doc.cfm?index=4400&type=0>.

of appropriation, or do so in more specific terms, however, are said to be authorized, as long as the budget authority that is provided falls within any limits prescribed by the authorization.

House Rules

Clause 2(a)(1) of House Rule XXI currently provides that

An appropriation may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, for an expenditure not previously authorized by law, except to continue appropriations for public works and objects that are already in progress.

This rule generally requires that an authorization be enacted prior to House consideration¹³ of the relevant general appropriations bill. It is typically not in order to simply make the availability of an appropriation contingent on the relevant authorization being enacted in the future, or to limit the availability of funds to the amount authorized in future legislation as a means of meeting the requirement that an authorization be previously enacted.¹⁴

The House considers an appropriation for a project or activity to be authorized if the relevant statute provides either broad or specific authority to engage in such projects or activities.¹⁵ That is, it is not necessary that an authorizing statute provide the same level of detail or specificity as an appropriation, as long as it might be subsumed under some broader authority. General grants of authority can constitute sufficient authorization to support appropriations depending on whether the general laws applicable to the function or department in question require a further, specific authorization.¹⁶ For example, a statute defining the authority of an agency, but providing that the authorization of appropriations be only for such sums as subsequently authorized by law to carry out those functions, would not be considered authorized by the original, organic statute.¹⁷

Similarly, permanent authority in an enabling or organic statute is considered sufficient to meet the requirement that appropriations be authorized by law unless a periodic scheme of authorization has been enacted or at some point in time “occupied the field.”¹⁸ In these instances, if an authorization is of limited duration and not reauthorized when it expired, subsequent appropriations would not be considered “authorized by law.”¹⁹

¹³ *House Practice*, chapter 4, §10. Clause 3 of Rule XVII requires that appropriations bills be considered in the Committee of the Whole, which is where the House usually considers amendments to appropriations bills. For further information, see CRS Report RL32200, *Debate, Motions, and Other Actions in the Committee of the Whole*, by Bill Heniff Jr. and Elizabeth Rybicki.

¹⁴ Rules of the House of Representatives, in *House Manual, One Hundred Thirteenth Congress*, H.Doc. 112-161, 112th Cong., 2nd sess., [compiled by] John V. Sullivan, Parliamentarian (Washington: GPO, 2013), (hereinafter *House Manual*), §1045.

¹⁵ *House Practice*, chapter 4, §12.

¹⁶ *House Manual* §1045.

¹⁷ *House Practice*, chapter 4, §12.

¹⁸ “(W)hether organic statutes or general grants of authority in law constitute sufficient authorization to support appropriations depends on whether the general laws applicable to the function or department in question require specific or annual authorizations or on whether a periodic authorization scheme has subsequently occupied the field (*House Manual* §1045).”

¹⁹ This includes instances where the authorization of appropriations expires part way through the fiscal year, making appropriations for any date beyond such expiration date unauthorized under House Rules. *House Practice*, chapter 4, (continued...)

In instances where the authorization limits the amount of budget authority that may be appropriated, appropriations in excess of that amount are also considered to be unauthorized.²⁰

In addition to statutes, an authorization can also be provided by a treaty that has previously been ratified by all parties.²¹

That Congress has previously enacted appropriations for an unauthorized project or activity does not constitute a sufficient authorization for future appropriations under House Rules.²² An executive order, by itself, is not considered a valid authorization of appropriations, “absent proof of its derivation from a statute enacted by Congress authorizing the order and expenditure of funds.”²³

Rule XXI, Clause 2(a)(1) contains a provision that excepts appropriations that would continue “public works and objects already in progress” from the prohibition on unauthorized appropriations. Historically, this has been narrowly construed and applied only in cases of “general revenue” funding.²⁴ According to the guidance provided in the *House Manual*, “‘public works and objects already in progress’ include tangible matters like buildings, roads, etc., but not duties of officials in executive department, or the continuance of a work indefinite as to completion and the continuation of works intangible in nature like the gauging of streams.”²⁵ This exception also does not apply to projects that are governed by an authorization that has expired, or “not yet under construction.” Some examples of things allowed as a continuation have included a topographical survey, the marking of a boundary line, and the recoinage of coins in the Treasury, but not scientific investigations, extensions of foreign markets for goods, and the extension of an existing road.²⁶

The rules of the House prohibiting unauthorized appropriations are enforced through points of order raised by Members from the floor during consideration of an appropriations bill and ruled on by the chair. A point of order against unauthorized appropriations may be raised against either an entire paragraph or a portion of a paragraph in a general appropriations bill, or amendment thereto. If the point of order is sustained against a provision, the provision is stricken from the bill, but consideration of the bill may continue. If the point of order is sustained against an amendment, its further consideration is out of order.²⁷

In the House, clause 1 of Rule XXI provides that all points of order against provisions of a general appropriations bill are automatically reserved at the time the bill is reported. A point of order against an amendment can only be reserved if allowed by the chair. A point of order must be raised against a provision in the bill during the reading of the bill for amendment, after the

(...continued)

§38.

²⁰ *House Manual* §1047.

²¹ *Ibid.*

²² *Ibid.*, §1046.

²³ *Ibid.*, §1045.

²⁴ *Ibid.*, §1048.

²⁵ *Ibid.*

²⁶ *Ibid.*; see *House Manual* §§1049-1051 for further examples of projects that have, and have not, been previously determined to fall under this exception.

²⁷ For further information, see *House Practice*, chapter 4, §67.

relevant paragraph has been read but before any amendments to that paragraph have been offered. A point of order against an amendment must be raised or reserved (if permitted) before debate against the amendment commences.²⁸ If the point of order is not raised, or is raised too late, the House may consider and agree to the appropriation, regardless of whether it would otherwise be considered to be authorized by law. If a point of order is raised against a provision of an appropriations bill as being unauthorized, the burden of proof is on the manager (normally the chair or ranking member of the committee that reported the measure) to demonstrate that the appropriation is authorized. If a point of order is raised against a provision of an amendment, the burden of proof is on the Member who introduced the amendment.²⁹

The prohibitions against unauthorized appropriations under House Rules may be waived by unanimous consent, suspension of the rules, or special rule. Such special rules may waive points of order against the entire bill or specific provisions contained in the bill that violate Rule XXI, clause 2(a).³⁰ It is also possible for points of order against potential floor amendments containing unauthorized appropriations to be similarly waived by a special rule.³¹ A waiver of points of order against provisions in the bill do not apply to amendments thereto unless the waiver is also made specifically applicable to amendments.³²

Senate Rules

The Senate has historically understood the meaning of “authorized by law” in broader terms than the House, and excluded appropriations as unauthorized in a more narrow set of circumstances.

Paragraph 1 of Senate Rule XVI currently provides that

On a point of order made by any Senator, no amendment shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or act or resolution previously passed by the Senate during that session; or unless the same be moved by direction of the Committee on Appropriations or a committee of the Senate having legislative jurisdiction of the subject matter, or proposed in pursuance of an estimate submitted in accordance with law.

To fulfill the requirements of this rule, an authorization must have been previously enacted, or have been passed by the Senate during the current session of Congress prior to consideration of the relevant general appropriations bill. As in the House, “provisions or stipulations of treaties” or simple resolutions (S.Res.) may constitute a valid authorization for the purposes of the Senate.³³

²⁸ For further information on raising points of order and reserving points of order on general appropriations bills, see *House Practice*, chapter 4, §65, §66.

²⁹ *House Manual* §1044a.

³⁰ *House Practice*, chapter 4, §68.

³¹ Such protection for a conference report and any amendments from the Senate containing unauthorized appropriations can also be provided by special rules that waive Rule XXI, clause 1(a) or Rule XXII, clause 5(b). For further information on waiving points of order with special rules, see CRS Report 98-433, *Special Rules and Waivers of House Rules*, by Megan S. Lynch.

³² *House Practice*, chapter 4, §68.

³³ *Riddick's Senate Procedure*, p. 178.

The passage of the authorization during any previous session of Congress, however, does not fulfill this requirement.

In the Senate, an authorization for a particular project or activity may be provided broadly, or specifically so that only certain types of projects or activities are authorized.³⁴ Furthermore, such authorizations may also place a specific limit on the level of budget authority that may be later provided through general appropriations legislation.³⁵ Finally, as in the House, appropriations that are contingent upon the later passage of authorizing legislation are generally not in order.³⁶

Senate Rule XVI also allows appropriations “proposed in pursuance of an estimate submitted in accordance with law.”³⁷ Such estimates can be provided in the President’s annual budget request, as required by 31 U.S.C. 1105(a) and 1107, or through deficiency and supplemental appropriations requests made after the President’s budget request has been submitted to Congress.³⁸ To permit an appropriation not otherwise authorized, estimates must be transmitted to Congress officially from the President, after having been prepared by the Office of Management and Budget.³⁹ An amendment offered by an individual Member or reported by a committee pursuant to this exception does not need to be printed and referred to the Committee on Appropriations a day in advance of being offered as would otherwise be required under Rule XVI paragraph 3.⁴⁰ In these instances, an amendment to the bill is in order if the amount of appropriations comes within the limit estimated.⁴¹ In instances where a specific level of budget authority has previously been authorized, however, a floor amendment that seeks to appropriate funds in excess of that amount, even if it falls within the amount contained in the budget estimate, is not in order.⁴²

The prohibition on unauthorized appropriations found in Senate Rules applies only in certain circumstances.⁴³ Provisions in the House-passed text of a general appropriations bill are not subject to points of order in the Senate, nor are provisions in a general appropriations bill originated by the Senate Committee on Appropriations or amendments to a House-passed bill reported by the committee.⁴⁴ Amendments containing unauthorized appropriations offered by direction of the authorizing committee with relevant jurisdiction are also allowed, as long as they have been reported and referred to the Committee on Appropriations at least one day before consideration.⁴⁵ Effectively, then, the Senate’s prohibition on unauthorized appropriations applies most significantly to amendments offered by individual Senators during consideration of a general appropriations bill.⁴⁶ While individual Senators may propose amendments increasing the

³⁴ Ibid., p. 179.

³⁵ Ibid.

³⁶ Ibid., p. 192.

³⁷ Ibid., p. 180.

³⁸ Ibid., p. 155.

³⁹ Ibid.

⁴⁰ Ibid., pp. 179-180.

⁴¹ Ibid., p. 191.

⁴² Ibid., p. 210.

⁴³ Ibid., p. 150.

⁴⁴ Ibid., p. 171.

⁴⁵ Ibid., p. 189.

⁴⁶ Ibid., p. 194.

amount appropriated if the project or activity is authorized, in cases where a specific amount has been authorized, the amendment must not cause appropriations to exceed that amount.⁴⁷

As is the case in the House, the rules against unauthorized appropriations in the Senate are enforced during floor consideration by points of order. Such points of order, however, are somewhat rare, due to the limited number of circumstances in which the Senate prohibition on unauthorized appropriations is applicable. In instances where an unauthorized appropriation is offered as an amendment by an individual Member that does not fall under any of the exceptions outlined above, a point of order can be raised at any point prior to the disposition of a pending matter.⁴⁸ If such a point of order is raised, in practice, the burden of proof is on the Member to demonstrate that the appropriation is authorized.

Legal Issues Related to Authorizations and Appropriations

Appropriations in the Absence of Authorizations

There is no constitutional or general statutory requirement that an appropriation must be preceded by a specific act that authorized the appropriation.⁴⁹ “The existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is itself sufficient legal authorization for the necessary appropriations, regardless of whether the statute addresses the question of subsequent appropriations.”⁵⁰

As the Comptroller General of the United States has explained,⁵¹

Where authorizations are not required by law, Congress may, subject to a possible point of order, appropriate funds for a program or object that has not been previously authorized or which exceeds the scope of a prior authorization, in which event the enacted appropriation, in effect, carries its own authorization⁵² and is available to the agency for obligation and expenditure.⁵³

⁴⁷ Ibid., p. 174.

⁴⁸ Ibid., p. 992-993.

⁴⁹ Government Accountability Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, Volume I, at 2-41 (3d ed. 2004) (hereinafter “GAO Red Book”).

⁵⁰ Id.

⁵¹ Title III of the Budget and Accounting Act of 1921, P.L. 67-13, 42 Stat. 20 (1921), created the General Accounting Office (the name of which was changed in 2004 to the Government Accountability Office, P.L. 108-271, 118 Stat. 811 (2004)) (GAO) and conferred upon the head of the GAO, the Comptroller General, the authority to issue legal decisions and legal opinions regarding the availability and use of appropriated funds by federal agencies. GAO Red Book, at 1-21, 1-39.

⁵² That is, the appropriation provides the authorization for the agency to spend money for the particular purpose specified in the appropriation act.

⁵³ GAO Red Book, at 2-69, citing *Matter of: Department Justice - Bureau of Justice Assistance - Project Authorized by Appropriation Act*, 67 Comp. Gen. 401 (1988); see also 36 Comp. Gen. 240, 242 (1956) (“It is fundamental ... that one Congress cannot bind a future Congress and that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditures of the public money.”).

Historically, as well as in recent years, Congress has on occasion appropriated money to fund programs with expired authorizations of appropriations.⁵⁴ If an authorization of appropriations expires, Congress may still appropriate money to fund the particular program, agency, or activity, as long as there is legislative history that shows that Congress intended for the program to continue (and not terminate), or “at least the absence of legislative history to the contrary.”⁵⁵ According to the Government Accountability Office (GAO), “as a general proposition, the appropriation of funds for a program whose funding authorization has expired ... provides sufficient legal basis to continue the program during that period of availability, absent indication of contrary congressional intent.”⁵⁶

For example, several programs originally authorized in the Violence Against Women and Department of Justice Reauthorization Act of 2005 (P.L. 109-162) and the Foreign Relations Authorization Act of 2003 (P.L. 107-228) have been funded by Congress over the years, including FY2011, despite their expired authorizations of appropriations.⁵⁷ Therefore, even though a program’s authorization of appropriations may have expired, an agency receiving such funding may use the funds (in accordance with the general statutory requirement that the funds be expended only for the purpose(s) for which Congress appropriated the funds).⁵⁸

A few statutes, however, require that funds to carry out particular activities may not be appropriated unless they have been specifically authorized.⁵⁹ For example, 10 U.S.C. Section 114(a) prohibits the appropriation of funds for military construction, procurement, and certain related research and development “unless funds therefore have been specifically authorized by law.” Such a statutory requirement for prior authorization of funding is effectively a directive to Congress itself. Thus, “if Congress appropriates money to the Defense Department in violation of 10 U.S.C. Section 114, there are no practical consequences. The appropriation is just as valid, and just as available for obligation, as if Section 114 had been satisfied or did not exist.”⁶⁰

Authorizations in the Absence of Appropriations

Although an authorizing statute may authorize the subsequent enactment of appropriations to provide funds for agencies and programs (and may establish specific spending ceilings for them), Congress may choose not to fund such program or activity or to provide a lesser amount.⁶¹ The lack of appropriation may be because Congress intentionally wanted to prevent something from happening, or may be because Congress failed to fund it for other reasons. For example, Members

⁵⁴ See Congressional Budget Office, *Unauthorized Appropriations and Expiring Authorizations*, January 2011, available at http://www.cbo.gov/ftpdocs/120xx/doc12044/01-14-UAEA_Approps.pdf.

⁵⁵ GAO Red Book, at 2-69, 2-70.

⁵⁶ Id. at 2-69.

⁵⁷ GAO Red Book, at 2-3.

⁵⁸ 31 U.S.C. §1301(a); *United States v. MacCollum*, 426 U.S. 317, 321 (1976).

⁵⁹ See, e.g., 42 U.S.C. §7270 (“Appropriations to carry out the provisions of this chapter shall be subject to annual authorization”); 22 U.S.C. §2412(a)(1) (“[N]o money appropriated for foreign assistance (including foreign military sales) shall be available for obligation or expenditure ... unless the appropriation thereof has been previously authorized by law...”); 22 U.S.C. §2680 (“[N]o money appropriated to the Department of State under any law shall be available for obligation or expenditure with respect to any fiscal year commencing on or after July 1, 1972 ... unless the appropriation thereof has been authorized by law enacted on or after February 7, 1972.”).

⁶⁰ GAO Red Book, at 2-41, 2-42.

⁶¹ Id. at 2-47; *United States v. Dickerson*, 310 U.S. 554 (1940).

of Congress may be interested in limiting or denying funding to federal agencies that are required by law to promulgate regulations, implement or enforce rules, initiate or operate programs, or take other specified actions. Unless otherwise provided by law, an agency that does not receive appropriations that can be used for a particular authorized program or activity has no discretionary power to utilize funding provided for other purposes (such as operations and maintenance) in order to carry out the unfunded activity (such as capital expenditures).⁶² Therefore, Congress can directly limit or prevent agencies from engaging in activities that are otherwise permitted or required by statute by explicitly denying funds for such purposes.⁶³

An authorizing statute that establishes a federal agency often creates statutory duties and obligations for that federal agency (including the responsibility to conduct certain acts, such as enforcement of particular laws that the agency is charged with administering). If an authorization of appropriations expires, or if Congress fails to appropriate sufficient funds without explicitly denying their use for a particular purpose, those statutory obligations still exist even though the agency may lack sufficient funds to satisfy them.⁶⁴ In these instances, prohibitions within the organic or enabling statute (for example, provisions that deem certain actions by individuals as violations of the statute) continue to be in effect regardless of the level of agency funding or the status of the authorization of appropriations.⁶⁵

If a statutory obligation concerns an entitlement to funds (such as a fixed salary established by law), the lack of appropriations will prevent a federal agency from spending money on the obligation, but the funds may be recovered by way of a lawsuit filed by the person with the vested entitlement:

It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute. ... The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims.⁶⁶

In another example, the U.S. Supreme Court in *United States v. Langston* held that the plaintiff John Langston could sue to recover the amount due to him under a statute providing that “[t]he

⁶² 31 U.S.C. §1532 (“An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law.”); 31 U.S.C. §1301(a) (“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”); *see also* GAO Red Book, at 2-25.

⁶³ For a more thorough discussion of this topic, see CRS Report R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues*, by Jessica Tollestrup.

⁶⁴ See, e.g., *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (duty to designate critical habitat for silvery minnow existed despite inadequate funding); *Center for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174 (D. Ariz. 2003) (inadequate financial resources did not excuse the Fish and Wildlife Service from obligation to follow court order to redesignate critical habitat); *Conservation Council for Hawai’i v. Babbitt*, 24 F. Supp. 2d 1074 (D. Hawaii 1998) (holding that insufficient resources were an inadequate reason for failing to designate critical habitat of 245 listed plants).

⁶⁵ For example, §11(g) of the Endangered Species Act (16 U.S.C. §1540(g)) “allows any citizen to commence a civil suit on his own behalf” with respect to certain specified provisions of the act. Persons who engage in actions prohibited by the act may still face such citizen suits, even if the agencies charged with administering the act temporarily lacked the funding to fulfill their enforcement responsibilities.

⁶⁶ *New York Airways, Inc. v. United States*, 177 Ct. Cl. 800, 810 (Ct. Cl. 1966), citing *United States v. Vulte*, 233 U.S. 509 (1914).

representative [of the United States] at [the Republic of Haiti] shall be entitled to a salary of \$7,500 a year” even though Congress had only appropriated \$5,000 a year for this purpose.⁶⁷ The Court noted that an unqualified right to compensation “should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law.”⁶⁸

For entitlements that are not yet vested,⁶⁹ courts have found that Congress may reduce amounts previously provided in authorization acts.⁷⁰ In *City of Los Angeles v. Adams*,⁷¹ for example, the U.S. Court of Appeals for the District of Columbia Circuit considered a section of the Airport and Airways Development Act of 1970 that established a formula for the apportionment of airport development grant funds and also specified minimum aggregate amounts for the grants. Subsequent appropriation acts, however, specifically limited the aggregate amounts available for the grants, to amounts less than those authorized. A grantee sued to recover the amount prescribed in the authorizing statute, but the court held that the receipt of grant funds was subject to limitations imposed by a subsequent Congress, explaining that,

According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization... Where Congress chooses to do so, however, we are bound to follow Congress’s last word on the matter even in an appropriations law.⁷²

The court noted, however, that the actual effect of a subsequent legislative enactment on an existing statutory right must be determined on a case-by-case basis: “The overall statutory context may, of course, lead to the conclusion in some instances that a mere appropriations omission or subsequent repeal does not undercut vested obligations.”⁷³ In addition, the court stated that an agency administering a statute is “required to effectuate the original statutory scheme as much as possible” in distributing such funds (such as a formula for apportionment of grant funds), “within the limits of the added constraint” imposed by the appropriation measure.⁷⁴

Some authorizing measures make entitlement to federal funds explicitly conditional on appropriations by using the phrase: “subject to the availability of appropriations.”⁷⁵ This language restricts the government’s liability to the amounts appropriated by Congress for the particular purpose. As the U.S. Court of Appeals for the Federal Circuit has explained,

⁶⁷ 118 U.S. 389, 390 (1886).

⁶⁸ *Id.* at 394.

⁶⁹ An entitlement is “vested” if the individual enjoys an unconditional right to it.

⁷⁰ For example, Congress could *prospectively* reduce the salary of members of the armed forces “even if that reduction deprived members of benefits they had expected to be able to earn.” *United States v. Larionoff*, 431 U.S. 864, 879 (1977). But Congress could not “deprive a service member of pay due for services already performed, but still owing,” as such an entitlement to money would have already vested. *Id.*

⁷¹ 556 F.2d 40 (D.C. Cir. 1977).

⁷² *Id.* at 49.

⁷³ *Id.*

⁷⁴ *Id.* at 50.

⁷⁵ GAO Red Book, at 2-50.

Although [a plaintiff] may have expected to receive full funding ... based on past experiences, the subject-to-availability-of-appropriations language ... prevents [the plaintiff] from asserting that it was entitled to full funding as a matter of right.⁷⁶

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⁷⁶ Babbitt v. Oglala Sioux Tribal Public Safety Dep't, 194 F.3d 1374, 1380 (Fed. Cir. 1999).